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Supreme Court, U. S.
FILED
JUL 3 1972
MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO.

JEROME DALY,

Petitioner

vs.

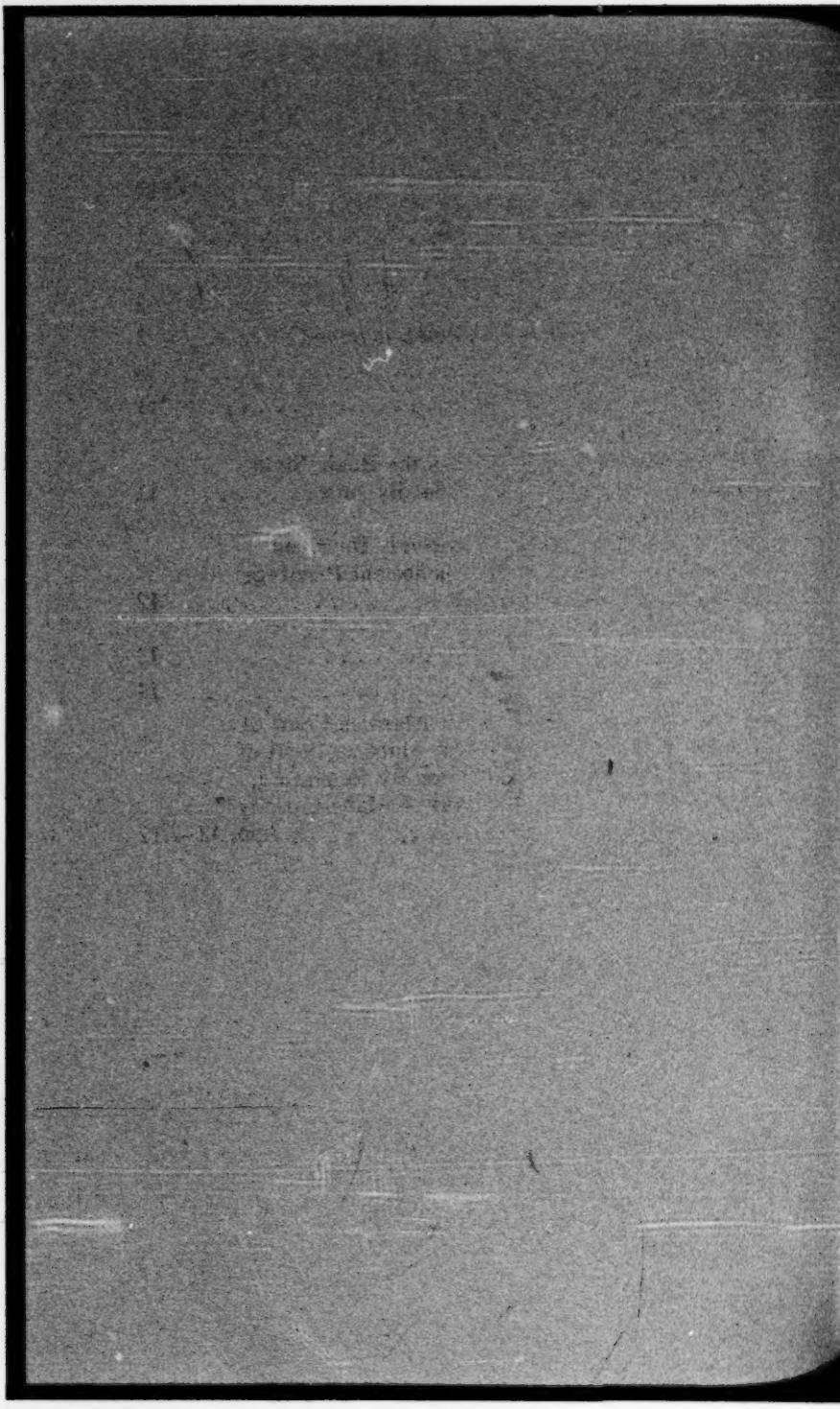
THE STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

JAMES M. FULLAN, JR., Esq.
Beddow, Embry & Beddow
900 Massey Building
Birmingham, Alabama 35203

Attorney for Petitioner



INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	2
Statement of the case	3
Reasons for granting the writ	11
1. The Decision Below Erases the Basic Sixth Amendment Right To A Trial By Jury	11
2. The Decision Below Effectively Deprives Petitioner Of His Fifth Amendment Privilege Against Self-Incrimination	12
Conclusion	13
Certificate of Service	14
Appendix (Opinion and Judgment of Alabama Court of Criminal Appeals, Judgment of Alabama Court of Criminal Appeals on Application for Rehearing, Judgment of the Supreme Court of Alabama Denying Certiorari)	App. A1–A12

CITATIONS

CASES: Page

Allen v. United States, 164 U.S. 492, 17 C.Ct. 154, 41 L.Ed. 526 (1896) 11

Jenkins v. United States, 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed. 957 (1965) 11

Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 12

Constitutional Provisions and Statutes:

United States Constitution, Fifth Amendment 2
United States Constitution, Sixth Amendment 2
United States Code, Title 28, Section 1257 (3) 2

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, Jerome Daly, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Alabama, rendered on January 11, 1972, which judgment affirmed the conviction of Jerome Daly for the crime of manslaughter in the second degree in the Circuit Court of Limestone County, Alabama.

A timely application for rehearing in the Alabama Court of Criminal Appeals was denied without opinion on February 8, 1972.

A timely application for a writ of certiorari was filed in the Supreme Court of Alabama and denied, without opinion, on April 6, 1972.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals has been reported at 260 So.2d 412, cert. den. 260 So.2d 418, and appears in the Appendix hereto.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on January 11, 1972 and appears in the Appendix hereto.

A timely application for rehearing was denied on February 8, 1972 and the judgment of the Alabama Court of Criminal Appeals appears in the Appendix.

A petition for writ of certiorari, timely filed in the Supreme Court of Alabama was denied on April 6, 1972 and the order thereon appears in the Appendix.

The statutory provision believed to confer jurisdiction upon this court to review the judgment of the Alabama Court of Criminal Appeals rendered on January 11, 1972 is 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Alabama denied to Petitioner Daly his Sixth Amendment right to a trial by an impartial jury in light of coercive supplemental instructions to the jury.

2. Whether or not Alabama deprived Petitioner Daly of his Fifth Amendment privilege against self incrimination.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committeed . . .

Constitution of the United States, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself..

United States Code, Annotated, Title 28:

> § 1257 (3). State courts; appeal; certiorari

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of . . . the United States.

STATEMENT OF THE CASE

Under an indictment charging manslaughter Petitioner Daly was convicted and sentenced under a verdict of the lesser and included offense of manslaughter in the second degree to ninety days imprisonment in the county jail.

The salient facts of the case are fairly set out in the opinion of the Alabama Court of Criminal Appeals found in the Appendix hereto. Matters here presented for review may be set out as follows:

QUESTION I

The jury received the case after a four-day trial at 5:55 P.M. on May 8, 1969. At 6:57 P.M., May 8, 1969, the jury was taken to dinner and returned to deliberate at 8:30 P.M. on May 8, 1969. At 1:37 A.M. on May 9, 1969 the jury returned to the courtroom, whereupon the following ensued:

THE COURT: Ladies and gentlemen, have you reached a verdict?

THE FOREMAN: No, sir, we have not.

THE COURT: I will ask you how far you are apart. I don't want you to tell me any number or anything; do you think there is any possibility that you can reach a verdict tonight?

THE FOREMAN: I don't think so.

THE COURT: Is one of the gentlemen sick?

ONE JUROR: Yes, sir, just fatigued.

THE COURT: Just fatigued?

ONE JUROR: Yes, sir.

THE COURT: I am sure all of you are. Ladies and gentlemen, you have had the case approximately six hours, I

suppose. Is there a wide gulf between you?

THE FOREMAN: Yes, sir.

THE COURT: Let me see the attorneys up here, please, sir.

(Whereupon counsel approached the Bench and (an off the record discussion was had after (which the following occurred:

THE COURT: Ladies and gentlemen, do you think there is any possibility of you reaching a verdict in this case?

THE FOREMAN: Your Honor, it hasn't changed. The vote hasn't changed.

THE COURT: In how long, please, sir?

THE FOREMAN: Since we went in.

THE COURT: You mean since the first time you voted?

THE FOREMAN: Yes, sir.

THE COURT: Well, ladies and gentlemen, you know what the procedure will be if you can't reach a verdict. It means that it will have to be submitted to another jury and have to go through the same thing all over again. I don't know at this time of any other evidence that any other jury would have.

Of course you know it's been approximately 40 or 50 witnesses testified in the cause this week, and to my knowledge most of the evidence that was available in this cause has been made available to you on the days you have heard the case. Are you having any particular problem with the law?

THE FOREMAN: No, sir, I don't think so.

THE COURT: In other words, you are in agreement and you understand what the proposition of law as applied to this case is?

THE FOREMAN: Yes, sir.

THE COURT: Mr. Drawbaugh, you don't feel like that you could deliberate any more tonight?

JUROR DRAWBAUGH: Your Honor, I will try my best.

THE COURT: Well, sir, we don't want you to make yourself sick. I know it's been a hard week and a hard day for everybody and – had you rather go home and come back tomorrow and see if you can reach a verdict?

JUROR DRAWBAUGH: No, sir, if it's possible, I had rather finish it tonight.

THE COURT: Well, would you like to take a little stretch

break outside and get some fresh air?

JUROR DRAWBAUGH: It might help.

THE COURT: Baliff, you and the Sheriff – I'm going to ask you to deliberate a little bit longer, ladies and gentlemen. I know it's been an imposition on you and everybody is tired and give out, but like I say, this same thing will have to be presented to another jury, and there is a lot of time and money and expense involved and like I said you have heard a lot of witnesses and there is a lot of evidence in the case and the Court is of an opinion that you have sufficient evidence before you to reach a verdict in this case. I'm not asking any of you to give up any of your convictions, but if you will remember as I have charged you, that you should consider this case in its full aspects as you have it. So I will let the Sheriff and the bailiff let you get a little exercise. I know being cooped up in there that you are tired and then I will ask you to come back and try it for a while longer and then if you report to me that you are just hopelessly deadlocked and you see no possibility at all to reach a verdict, then we will have no alternative but to declare a mistrial and submit this to another jury, but it has to end somewhere.

So bailiff, if you and the Sheriff will take them out and let them get some air outside and I will ask you then to come back and try it for a little while longer. (R. 648–650)

Thereafter, at 3:02 A.M. on May 9, 1969 the jury returned a verdict of guilty.

QUESTION II

At the clear accusatory stage of the investigation State Trooper Patterson went to defendant's home where the following occurred:

Q. Did you warn him of his constitutional rights, Bob?
A. Yes, I did. When he came to the door I gold him his car was suspected of being involved in something, and I told him of his rights.
Q. Did you go down the list of them, you know?
A. I told him--
Q. All the things you have to tell the defendant before you can question him?

MR. STEELE: Now, we object to that, if it please the Court.

MR. NELSON: Well, hell, I'm just laying the predicate, Judge.

MR. STEELE: Now, we object to that language that the solicitor used then and move to strike that out.

THE COURT: Well, there is a proper way to ask, Mr. Nelson, and I think you know that.

MR. NELSON: I'm sorry, Judge, and I apologize. I'm just trying to lay the predicate that's required, Judge, that's all I'm trying to do.

THE COURT: Well, you can ask him what he told him.

MR. NELSON: All right.

Q. What did you tell him?

A. I told him that his car had been involved in something and we thought he was a suspect, and I told him he didn't have to make any statement to me that he didn't want to. I told him he had the right to remain silent and that if he wanted counsel that counsel could be obtained for him before he told us anything. And he said he knew all that.

Q. He said he knew all about that, huh?

A. He knew all of that, or words to that effect. He already knew it.

Q. Did you tell him – go on then and tell him that if anything he said to you could be used against him in a court of law?

A. Yes, sir, I did.

Q. Did you tell him –

MR. STEELE: We object to leading the witness.

A. I told him it would be used against him.

MR. STEELE: Wait a minute. We object.

THE COURT: Well, just ask him what he told him. Now, did you inform him that he was under arrest or was in your custody at this time?

THE WITNESS: No, sir. I didn't inform him that he was under arrest. I just told him he was a suspect, Your Honor.

THE COURT: Did you ask him to come with you or come out to the patrol car?

THE WITNESS: Yes, sir, I did.

THE COURT: Well, you had him in the patrol car during

this time?

THE WITNESS: No, sir, we wasn't in the patrol car. We were just standing up out in his front yard.

THE COURT: But you told him to come outside?

THE WITNESS: Yes, sir.

THE COURT: All right.

MR. NELSON: What I am trying to do, Judge, – this is a list of things, Judge, that a man has to remember and they read them off –

MR. STEELE: Yes, and a witness has got to remember to do that, too, and not the solicitor –

MR. NELSON: Well, let me finish my statement, Mr. Steele, please. It's a list of things that they have to remember. They read them off of a card and they warn them of them. And so I think we ought to –

MR. STEELE: We object to –

MR. NELSON: Let me finish Mr. Steele, please.

MR. MALONE: He didn't read that off.

MR. NELSON: I think we ought to be allowed to refresh a witness's memory of what's on a card of what they read off to the defendant.

THE COURT: Well, if he has notes or anything he can refer to, to refresh his memory, I think it's admissible, but I think the objection here is the fact that the defense thinks that you are testifying.

BY MR. NELSON:

Q. Well, to refresh your recollection – to refresh your recollection on that night in question up there at Mr. Daly's, did you tell him on that time and occasion that anything he said there –

MR. STEELE: We object to leading the witness.

MR. NELSON: I am refreshing his recollection, Judge.

MR. STEELE: We object to leading the witness or refreshing his recollection.

MR. NELSON: Well, I think that the law says you can do it.

THE COURT: Well, I think you can. Go ahead and finish your question.

MR. STEELE: Well, we except.

BY MR. NELSON:

Q. That he had the right to remain silent and anything he said might be used against him in court?

MR. STEELE: We object, again, now, for the record.

THE COURT: Well, I –

MR. STEELE: He is leading the witness.

MR. NELSON: Well, I'm refreshing his recollection, Judge.

MR. STEELE: He can ask the witness one simple question: Did you read the card off to the defendant.

THE COURT: Well, that's what I have been trying to –

MR. STEELE: Well, I've been trying to suggest that to him, too. Now, we will have no objection if he will ask him that question.

THE COURT: Go ahead and ask him the question.

MR. NELSON: What question? I wasn't even listening.

MR. STEELE: You can ask him, as far as we are concerned, if he had the card and read it off to the defendant.

BY MR. NELSON:

Q. Did you have the card?

A. No, sir.

Q. Did you go from memory?

A. Yes, sir.

MR. STEELE: Then we object, now. We renew our objection to the solicitor refreshing his memory or coaching or leading the witness of any kind as to what statements were made by the witness to the defendant on that occasion.

THE COURT: Proceed, Mr. Nelson.

MR. NELSON: All right.

BY MR. NELSON:

Q. Go ahead and tell us what rights you warned him of the best you can remember and sit there if you have to and make your list and check them off.

A. The best I remember I told him that he didn't have to make any statement if he didn't want to make one. I told him that any statement that he did make would be used against him in a court of law. I told him if he wanted a counsel, counsel could be obtained for him. And he said he understood that.

THE COURT: He said what?

THE WITNESS: He said he understood what I was talking about.

THE COURT: Now, had you restrained him in any way at this time when you told him that any charges were preferred against him?

THE WITNESS: No, sir. I told him at that time that he was just a suspect.

THE COURT: Well, did you take him into custody at that time?

THE WITNESS: As far as asking him to step out in the yard with me was the only thing.

THE COURT: After you talked with him did you take him into custody?

THE WITNESS: No, sir. I detained him until State Investigator Hancock arrived at the scene.

THE COURT: Well, then, he was in custody?

THE WITNESS: Yes, sir.

THE COURT: Did he make a written statement to you?

THE WITNESS: No, sir.

THE COURT: Did he make an oral statement to you concerning his activities?

THE WITNESS: Yes, sir.

THE COURT: The statement he made to you was his own free will after you had advised him of his rights?

THE WITNESS: Would you repeat that, Your Honor?

THE COURT: Did he state to you after you advised him of his rights that he understood them, that he wanted to make a statement to you?

THE WITNESS: No, sir, he didn't say that.

THE COURT: Well, did he make a statement to you?

THE WITNESS: Yes, he was talking around there. As far as just giving me a complete statement at one time, he didn't. He would talk about one thing and then talk about another.

BY MR. NELSON:

Q. He was talking, there wasn't any interrogation as such, was it?

A. I was waiting on State Investigator Hancock who was more qualified than I was to conduct an investigation and write it down. I was just detaining him for him.

Q. Let me ask you this question, Bob: Did you or did you not on that time an occasion tell this defendant that he had a right to remain silent?

A. Yes, sir, I told him that when I first started talking to him.

Q. All right. Did you or did you not tell him that anything he said could be used against him in a court of law?

A. Yes, sir. I told him that.

MR. STEELE: We object. That's repetitious. The witness has already said that he did.

THE COURT: I will overrule.

MR. STEELE: We except.

Q. All right. Did you or did you not tell him that he had a right to have a lawyer present when you were questioning him, that if he couldn't afford one the Court would appoint him one?

MR. STEELE: Now, we object because he is leading the witness. The witness just got through testifying –

MR. NELSON: I asked him did he or not.

MR. STEELE: – that he told the defendant that the witness was entitled to have a lawyer represent him but the witness completely omitted stating that he told the defendant that if he did not have counsel the Court would appoint one for him, and now the solicitor is trying to lead him into saying something; that the witness has completed his narrative and such was not included, and we object.

MR. NELSON: He did not say it was not included, Judge.

THE COURT: Did you tell the man that the Court would appoint him a lawyer?

THE WITNESS: Yes, I did.

THE COURT: Well, overruled.

MR. STEELE: We except to the Court's question and the answer and to the Court's ruling.

THE COURT: I am going to let you ask him. Bring the jury back in.

MR. NELSON: Now, Judge, do you want me to qualify him as to his constitutional rights? They objected to that a minute ago.

THE COURT: I think under the circumstances that that was outside the hearing of the jury. Go ahead and question him.

MR. NELSON: Just go ahead and question him?

THE COURT: Yes, sir.

MR. NELSON: Well, we have that voluntariness in, now. I assume all that was in the presence of the jury; whether he was threatened or coerced or induced. (R. 121–127).

Thereafter, Trooper Patterson told the jury that the defendant stated when asked if he committed the crime charged:

"If I did, I don't remember it", and "I must have hit a mail box."

REASON FOR GRANTING THE WRIT

I.

THE DECISION BELOW ERASES THE BASIC SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY.

The right to a trial by jury includes a trial absent coercion by the trial judge in spite of *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). The statement of the Solicitor General in *Jenkins v. United States*, 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) is worth repeating:

> "Of course, if this Court should conclude that the trial judge's statement had the coercive effect attributed to it, the judgment should be reversed and the cause remanded for a new trial; the principal that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration."

The instant case reveals the following factors supporting coercion:

1. Extensive deliberation after a lengthy trial.
2. That the jury was required to deliberate into the early morning hours.
3. Juror fatigue.
4. Complete and total diversity among the jurors.
5. The following coercive statements by the trial judge:

a. That the case would have to be submitted to another jury and the same thing gone through again.

b. That all the evidence available has been presented to the jury.

c. That 40 or 50 witnesses had testified in the

case.

d. That a lot of time, money and expense was involved.

e. That the case had to end somewhere.

Under the totality of evidence revealed by the above, the instant case exceeds even the questionable bounds of *Allen*, supra, and fails to apprise the jury that they should reach a verdict if they could conscientiously do so.

The decision below effectively deprives Petitioner of his Sixth Amendment right to a trial by jury.

II.

THE DECISION BELOW EFFECTIVELY DEPRIVES PETITIONER OF HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

That the rights implemented by *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 remain in grave danger through slipshod judicial inquiry into the warning procedures is clearly revealed in the case at Bar.

The Alabama Court of Criminal Appeals, in its opinion, recited in detail what it apparently considered to be the pertinent part of the rights advisory by the investigating officer. The recitation of the Alabama court fails to reveal a clear warning to the defendant that, if unable to secure counsel same would be furnished to him by Alabama. In all candor, we have included herein the total voire dire proceeding which culminated, after a lengthy, leading and suggestive examination of the investigating officer in an effort to lay the proper constitutional predicate, with the trial judge's off-the-cuff inquiry as to the existence of the missing element of the *Miranda* warning:

> "THE COURT: Did you tell the man that the Court would appoint him a lawyer?
>
> "THE WITNESS: Yes, I did." (R. 127).

We urge the warnings called for in *Miranda* must be given and received intelligently and that the burden of proving this is on the State if the elicited statements are to be proffered to the jury. The after-the-fact assertion by the witness under

the lash of the trial court that he had informed the defendant that a lawyer would be appointed for him, even if accepted at face value, is of doubtful validity. When would the lawyer be appointed and for what purpose? At a subsequent trial to conduct the defense thereof, or then and there in the front yard of defendant's home to intelligently advise the defendant of his rights? Obviously, there was no court present to appoint a lawyer to advise the defendant of his rights on the spot.

The Alabama Court of Criminal Appeals seemingly places some faith in the assertion that defendant's statements were, at worst, negative in nature. We cannot conceive that in response to an accusation of the commission of a criminal act defendant's statement, "If I did, I don't remember it." would be received by a trier of fact as exculpatory in nature. We need not indulge into this inquiry as we believe the prohibition to apply to exculpatory as well as inculpatory statements. The decision below, under the totality of the circumstances, negates and rejects decisions of this Court and operates to deprive Petitioner of a basic constitutional right.

CONCLUSION

To protect the fundamental constitutional rights of trial by jury and the privilege against self-incrimination a writ of certiorari should issue to review the judgment and opinion of the Alabama Court of Criminal Appeals.

Respectfully submitted,

JAMES M. FULLAN, JR.
BEDDOW, EMBRY & BEDDOW
900 Massey Building
Birmingham, Alabama 35203

June 29, 1972

Counsel for Petitioner

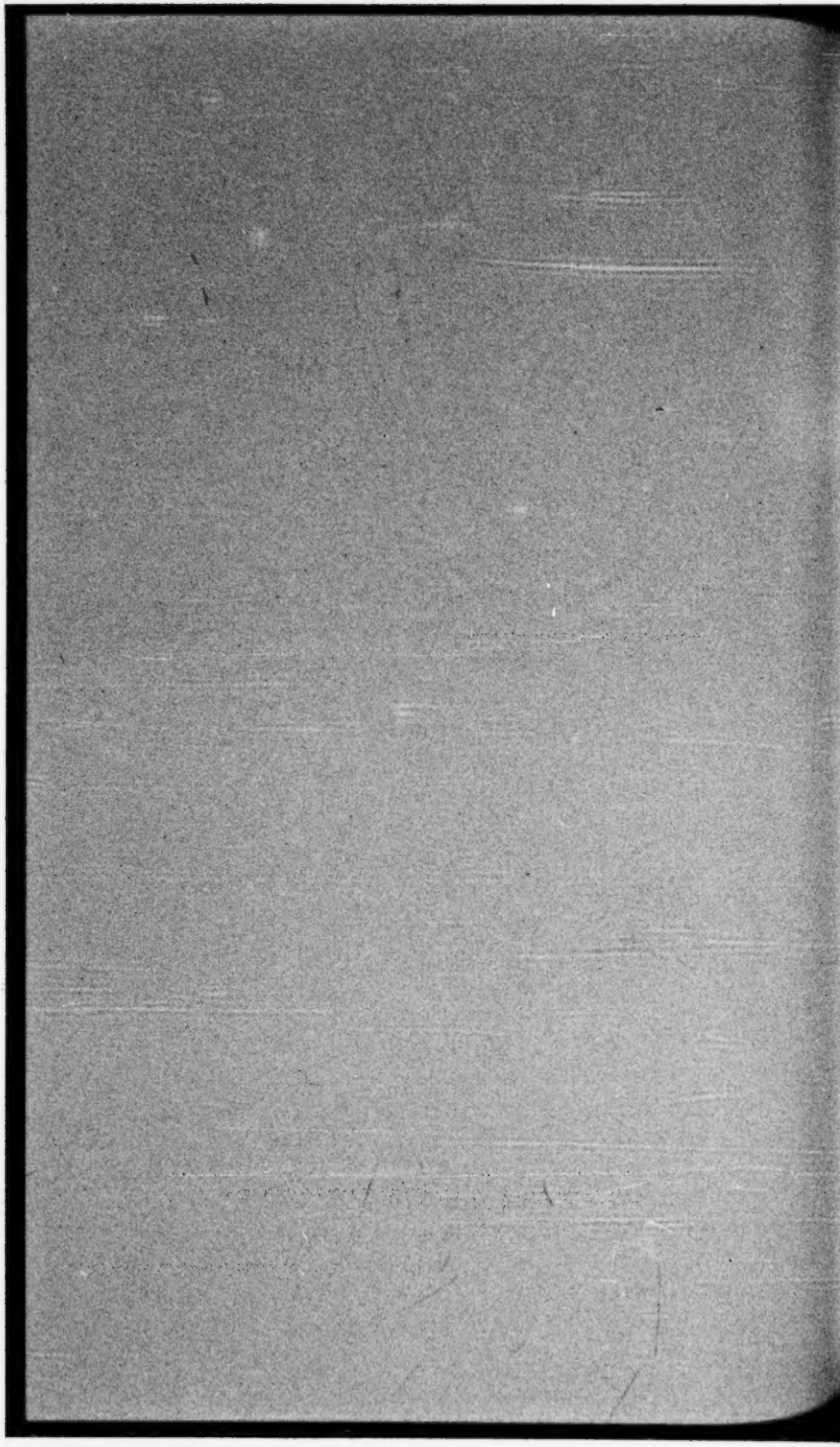
CERTIFICATE OF SERVICE

I, James M. Fullan, Jr., attorney for Jerome Daly, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of June, 1972, I served three copies of the foregoing Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals on the State of Alabama as follows:

By mailing in the United States mail three copies of same in a duly addressed envelope with first class postage prepaid to the Honorable William J. Baxley, Attorney General of the State of Alabama, Office of the Attorney General, State of Alabama Administrative Building, Montgomery, Alabama 36104.

JAMES M. FULLAN, JR.
Attorney for Jerome Daly
900 Massey Building
Birmingham, Alabama 35203

APPENDIX A



THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1971–72

8 Div. 57

Jerome Daly

v.

State

Appeal from Limestone Circuit Court

PER CURIAM

The appellant was convicted in the Circuit Court of Limestone County of manslaughter in the second degree and sentenced to ninety days imprisonment in the county jail. From this judgment he appeals.

The State's evidence tends to show that appellant spent the afternoon of August 8, 1968, in and around Rainey's Tavern in Elkton, Tennessee, which is a short distance over the Alabama state line; that later in the afternoon, after having eaten supper with one of his friends, he came back to the tavern for a short while; and that he then started for home driving his sister's 1961 cream colored Ford automobile.

It appears that during the afternoon and up until he finally left the tavern to go home he had drunk several beers. The exact number was more or less in doubt but there was some evidence that he was under the influence of alcohol when he started home. On his way home he was stopped and his driver's license was checked by two local deputies near the overpass where the traffic leaves the interstate highway going to the Elkton Road. The deputy sheriffs who stopped him allowed him to continue on his way but he was followed for some distance by a patrol car driven by Trooper Patterson of the State Patrol. Patterson testified that appellant's automobile was at times weaving back and forth on the road; that he and his partner, Auxiliary Trooper Padgett, did not stop appellant, who later turned off a side road toward his home;

that within a short time, the patrolmen had their attention called to an automobile which was taking Rickey Daly, a young boy who had been struck by a car, on an emergency run to the hospital; and that the patrolmen guided this automobile to the hospital.

The State's testimony further tends to show that Rickey Daly, his brother Jeff Daly, and Kenneth Hunter were walking along the Elkton Road on the right side and off the used portion of the road when an automobile approached from the rear, ran off the used portion of the road some short distance, and struck Rickey Daly, whereby he was injured and later died from the injuries suffered. At the time he was struck, the injured boy was carrying some groceries and a carton of soft drinks. Some of the soft drink bottles were broken by the impact and the fluid was spilled out. The witnesses, Jeff Daly and Kenneth Hunter, testified that the car was tannish in color and had big round tail lights and was moving at a rapid rate of speed. Some of the testimony tended to show that the car was travelling at approximately seventy miles per hour.

It further appears from the State's testimony that this accident happened at about 8:30 in the evening of August 8, 1968. All of the witnesses for the State, and the appellant himself, testified that the car was either beige, cream colored or light tan and that it was a 1961 Ford.

Later in the evening State Trooper Patterson and Sergeant Hancock, a State Investigator, talked with appellant at his home. To questions asked by Trooper Patterson appellant gave answers of a negative nature that if he had hit someone he didn't remember it, and that he must have hit a mail box somewhere to put the dents found in the fender and hood on the right side of the car. According to the testimony of Trooper Patterson the appellant made the voluntary statement, "What was that kid's name I hit?".

One of the State Toxicologists, Dr. Vann V. Pruitt, Jr., testified that he examined the automobile on the night of the accident and found sticky brown colored substance on the fender and right side of the car. He stated that he could not identify this substance. He said that he found dents in the

fender and hood of the car and a small amount of paint ground into the injured boy's trousers which matched a sample of the paint which he took from the car.

The appellant denied that the automobile he was driving struck the boy and set up an alibi, which was supported by his witnesses, that at the time of the occurrence he had already reached his home and was engaged in preparing his National Guard equipment for active duty the next day. He did not deny that he drank some beer during the afternoon and did not deny driving along the road where the boy had been struck, but emphatically denied any participation in the act.

The testimony is voluminous and this Court will not attempt to go into further detail.

"Manslaughter in the second degree is defined as the unlawful killing of another human being, without malice and without the intent to kill or to inflict the injury resulting in death, but accidentally committed by the accused while he was doing an unlawful act amounting to a misdemeanor, or accidentally committed by the accused while he was doing a lawful act, but in a grossly negligent or improper manner." *Jones v. State*, 21 Ala. App. 234, 109 So. 189.

When the State rested its case, the appellant made a motion to exclude the testimony, which motion was overruled by the court. Under the tendencies of the evidence for the State, the motion was properly overruled and the case submitted to the jury.

After the verdict was given the appellant filed a motion for a new trial, which was overruled.

The appellant insists that the case should be reversed because of the failure of the State to prove venue. This is a matter which may be proven by circumstantial evidence and there is some evidence in the record tending to prove the location in Limestone County, Alabama, but aside from this the matter was not called to the court's attention before argument by a request for the affirmative charge based on this failure by the State to prove venue. This matter cannot be raised for the first time by a motion for a new trial or an appeal. Rule 35, Circuit and Inferior Court Rules, Tit. 7,

Appendix, Code of Alabama, 1940, as recompiled 1958; *Richardson v. State*, 39 Ala. App. 207, 98 So.2d 59, cert. denied 266 Ala. 699, 98 So.2d 65; *Payne v. State*, 40 Ala. App. 493, 115 So.2d 670.

State's witness Padgett, an Auxiliary Trooper who was riding with Trooper Patterson on the night of this occurrence, testified that while he was standing in the yard of the home of appellant near the white Ford car, the appellant walked up to him and said, without any other words being spoken by either of them, "What was the kid's name I hit?". According to Padgett, he did not interrogate or talk with appellant at all. Padgett further testified that this occurred after Officer Hancock had read appellant's constitutional rights to him from a card.

Appellant argues error by the court in admitting the testimony of Trooper Patterson of statements made by appellant when questioned by Patterson at the home of appellant after the occurrence. The record shows the following testimony by Patterson outside the presence of the jury:

"**BY MR. NELSON**:

"Q. Did you warn him of his constitutional rights, Bob?

"A. Yes, I did. When he came to the door I told him his his car was suspected of being involved in something, and I told him of his rights.

"Q. What did you tell him?

"A. I told him that his car had been involved in something and we thought he was a suspect, and I told him that he didn't have to make any statement to me that he didn't want to. I told him he had the right to remain silent and that if he wanted counsel that counsel could be obtained for him before he told us anything. And he said he knew all that.

"Q. He said he knew all about that, huh?

"A. He knew all of that, or words to that effect. He already knew it.

"Q. Did you tell him – go on then and tell him that if anything he said to you could be used against him in a court of law?

"A. Yes, sir, I did.

. . .

"Q. Go ahead and tell us what rights you warned him of the best you can remember and sit there if you have to make your list and check them off.

"A. The best I can remember I told him that he didn't have to make a statement if he didn't want to make one. I told him that any statement that he did make would be used against him in a court of law. I told if he wanted a counsel, counsel could be obtained for him. And he said he understood that.

. . .

"Q. Let me ask you this question, Bob: did you or did you not at that time and occasion tell this defendant that he had a right to remain silent?

"A. Yes, sir, I told him that when I first started talking to him.

"Q. All right. Did you or did you not tell him that anything he said could be used against him in a court of law?

"A. Yes, sir. I told him that."

The statements admitted over objection were, when asked if he struck a child, "If I did, I don't remember it," and, "I must have hit a mail box." These answers were negative in nature. However, it appears that the *Miranda* rule was complied with and there was no error by the court in admitting the testimony. *Elrod v. State*, 281 Ala. 331, 202 So.2d 539; *Beverly v. State*, 281 Ala. 325, 202 So.2d 534.

Before the testimony was offerred the attorney for appellant had examined the witness with regard to this matter on voir dire out of the presence of the jury and no objection was made on voir dire to the ruling of the court. Alleged error in the admission of evidence cannot be raised for the first time by motion for a new trial or on appeal. *Smith v. State*, 40 Ala. App. 600, 119 So.2d 202, cert. denied 270 Ala. 741, 119 So. 2d 203.

In brief, the attorney for appellant complains of the actions of the prosecuting attorney in asking illegal questions and reflecting on the conduct of one of the attorneys for the appellant.

We have examined the matters complained of as shown by the record. Objections were sustained to those questions

calling for illegal testimony and the court, in some instances, instructed the jury to disregard the erroneous matter. In one or more instances objection to questions came after the witness had answered. Failure to object before a witness answers an illegal question does not put the court in error (unless it is shown that the answer is made so quickly as to preclude objection) even if a motion to exclude is overruled. Douglas *v. State*, 42 Ala. App. 314, 163 So.2d 477.

The case lasted for the better part of a week and the record is replete with argument between counsel for the State and appellant and not a little bickering. The court was in a better position than this Court to see, hear, and understand the atmosphere of the trial. We do not think his actions, within his wide discretion, in the matters complained of were erroneous.

This case was submitted to the jury on May 8, 1969, at 5:55 P.M. The jurors were allowed to make or send telephone calls to their families regarding their likelihood of being at the courthouse late. After being taken to supper they resumed their deliberations at 8:30 P.M. At 1:27 A.M. on May 9, 1969, they reported back to the courtroom and stated that they were unable to reach a verdict. The record shows the following:

"THE COURT: Ladies and gentlemen, have you reached a verdict?
"THE FOREMAN: No, sir, we have not.
"THE COURT: I will ask you how far you are apart. I don't want you to tell me any number or anything; do you think there is any possibility that you can reach a verdict tonight?
"THE FOREMAN: I don't think so.
"THE COURT: Is one of the gentlemen sick?
"ONE JUROR: Yes, sir, just fatigued.
"THE COURT: Just fatigued?
"ONE JUROR: Yes, sir.
"THE COURT: I am sure all of you are. Ladies and gentlemen, you have had the case approximately six hours, I suppose. Is there a wide gulf between you?
"THE FOREMAN: Yes, sir.
"THE COURT: Let me see the attorneys up here, please, sir.

(Whereupon counsel approached the bench and an (off the record discussion was had after which (the following occurred:

"THE COURT: Ladies and gentlemen, do you think there is a possibility of you reaching a verdict in this case?

"THE FOREMAN: Your Honor, it hasn't changed. The vote hasn't changed.

"THE COURT: In how long, please, sir?

"THE FOREMAN: Since we went in.

"THE COURT: You mean since the first time you voted?

"THE FOREMAN: Yes, sir.

"THE COURT: Well, ladies and gentlemen, you know what the procedure will be if you can't reach a verdict. It means that it will have to be submitted to another jury and have to go through the same thing all over again. I don't know at this time of any other evidence that any other jury would have.

"Of course you know it's been approximately 40 or 50 witnesses testified in the cause this week, and to my knowledge most of the evidence that was available in this cause has been made available to you on the days you have heard the case. Are you having any particular problem with the law?

"THE FOREMAN: No, sir, I don't think so.

"THE COURT: In other words, you are in agreement and you understand what the proposition of law as applied to this case is?

"THE FOREMAN: Yes, sir.

"THE COURT: Mr. Drawbaugh, you don't feel like that you could deliberate any more tonight?

"JUROR DRAWBAUGH: Your Honor, I will try my best.

"THE COURT: Well, sir, we don't want you to make yourself sick. I know it's been a hard week and a hard day for everybody and -- had you rather go home and come back tomorrow and see if you can reach a verdict?

"JUROR DRAWBAUGH: No, sir, if it's possible, I had rather finish it tonight.

"THE COURT: Well, would you like to take a little stretch break outside and get some fresh air?

"JUROR DRAWBAUGH: It might help.

"THE COURT: Bailiff, you and the Sheriff -- I'm going to ask you to deliverate a little bit longer, ladies and gentlemen, I know it's been an imposition on you and

everybody is tired and give out, but like I say, this same thing will have to be presented to another jury, and there is a lot of time and money and expense involved and like I said you have heard a lot of witnesses and there is a lot of evidence in the case and the court is of the opinion that you have sufficient evidence before you to reach a verdict in this case. I'm not asking any of you to give up any of your convictions, but if you will remember as I have charged you, that you should consider this case in its full aspects as you have it. So I will let the Sheriff and the bailiff let you get a little exercise. I know being cooped up in there that you are tired and and then I will ask you to come back and try it for a while longer and then if you report to me that you are just hopelessly deadlocked and you see no possibility at all to reach a verdict, then we will have no alternative but to declare a mistrial and submit this to another jury, but it has to end somewhere.

"So bailiff, if you and the Sheriff will take them out and let them get some air outside and I will ask you then to come back and try it for a little while longer."

The appellant contends that the jury was coerced into reaching a verdict by the remarks of the court, wherein reversible error was committed. The verdict was reached at 3:02 A.M. no exception was reserved to the court's instruction. No ground of Daily's motion for new trial raised any claim of error in keeping the jury together for deliberation until such an early morning hour.

Hence, no ruling was had from the trial judge to revise his instruction or to set aside the verdict. Thus we are confronted with an unprotected record. See *Meadows v. State*, 182 Ala. 51, 2 So. 737.

The court refused twenty written charges requested by appellant. The refusal to give charges covered by the oral charge of the court or given written charges is not error. *Myrick v. State*, 21 Ala. App. 372, 108 So. 633.

Charges 35, 36 and 37 were affirmative in substance and were properly refused as the evidence presented a jury question.

Charges 9 and 11 were character charges and covered by the oral charge of the court.

Charges 1, 22, 23, 25, 26, 40, 41 and 42 were on the rule as to reasonable doubt and the presumption of innocence were covered in sustance by the oral charge and several given charges.

Charge 21 on the rule wherein the evidence is circumstantial is covered in substance by given charges 12 and 13.

Charge 33 with regard to the defendant as witness for himself was covered by the oral charge.

The record in this case of 691 pages has been examined by the Court and we find no error of a reversible nature.

The foregoing opinion was prepared by W. J. Haralson, Supernumerary Circuit Judge, and adopted by this Court as its opinion.

AFFIRMED.

JANUARY 11, 1972

STATE OF ALABAMA – JUDICIAL DEPARTMENT

ALABAMA COURT OF CRIMINAL APPEALS

8th Div. 57

Jerome Daly

vs.

State of Alabama

Appeal from Limestone Circuit Court

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant and sureties on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

A11

FEBRUARY 8, 1972

STATE OF ALABAMA – JUDICIAL DEPARTMENT

ALABAMA COURT OF CRIMINAL APPEALS

8th Div. 57

Jerome Daly

vs.

State of Alabama

Appeal from Limestone Circuit Court

IT IS ORDERED that the application for rehearing be and the same is hereby overruled.

THURSDAY, APRIL 6, 1972

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1971–72

8th Division 477

EX PARTE: JEROME DALY, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Jerome Daly v. State of Alabama)

Limestone Circuit Court

Comes the petitioner, and the Petition for Writ of Certiorari to the Court of Criminal Appeals being submitted and duly examined and understood by the Court, it is considered and ordered that the Petition for Writ of Certiorari to the Court of Criminal Appeals be, and the same is hereby, denied, and the petition be, and the same is hereby, dismissed at the cost of the petitioner, for which cost let execution issue.

LE COP

Supreme Court, U. S.
FILED
JUL 25 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 72-26

JEROME DALY,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

WILLIAM J. BAXLEY
Attorney General of Alabama

DAVID W. CLARK
Assistant Attorney General
of Alabama

Counsel for Respondent

INDEX

Subject Index

	Page
Opinions of the Court Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement	3
Summary of Argument	3
Argument	3
Conclusion	9
Certificate	11

TABLE OF CASES CITED

Page

Allen v. United States, 164 U. S. 492, 17 S. Ct. 154, 41 L. Ed. 528 5

Jerome Daly v. State, 260 So. 2d 412, cert. denied 260 So. 2d 418 1

Elrod v. State, 281 Ala. 331, 202 So. 2d 539 9

Gidley v. State, 19 Ala. App. 113, 94 So. 330 4

Huffman v. United States, 297 F. 2d 754 5

Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 ..... 3, 8, 9

Oden v. State, 41 Ala. App. 212, 127 So. 2d 380 4

Orr v. State, 40 Ala. App. 45, 111 So. 2d 627, affirmed 269 Ala. 176, 111 So. 2d 639 5

Thaggard v. United States, 354 F. 2d 754, certiorari denied 86 S. Ct. 1222, 383 U. S. 958, 16 L. Ed. 2d 301 5

STATUTES CITED

Page

United States Code, Title 28, Section 1257 (3) 2

Fifth Amendment to the Constitution of the United States 2

Sixth Amendment to the Constitution of the United States 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 72-26

JEROME DALY,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

Jerome Daly v. State of Alabama, 8th Division, 57, 260 So. 2d 412. Certiorari was denied, 260 So. 2d 418.

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Criminal Appeals of Alabama rendered on January 11, 1972. Application to the Court of Criminal Appeals of Alabama for rehearing was denied on February 8, 1972. A petition to the Supreme Court of Alabama for writ of certiorari was denied on April 6, 1972. Petitioner applies under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTIONS PRESENTED

1. (a) Was defendant denied right to trial by an impartial jury because of alleged coercive supplemental instructions to the jury in the absence of an objection or exception to the trial judge's statement to the jury?

(b) Was the language of such supplemental instructions beyond the permissible bounds of such a charge?

2. Was petitioner Daly deprived of his Fifth Amendment privilege against self-incrimination in view of the evidence?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth and Sixth Amendments to the Constitution of the United States.

V

STATEMENT

Petitioner, a white man, was convicted in the Circuit Court of Limestone County, Alabama, of manslaughter in the second degree and sentenced to ninety days imprisonment in the county jail.

VI

SUMMARY OF ARGUMENT

1. A so-called "Allen" charge, so long as it makes plain to a jury that each member of the jury has a duty conscientiously to adhere to his own honest opinion and avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial, is a permissible charge to be given in proper circumstances.

2. Petitioner's constitutional rights against self-incrimination was fully protected and he was afforded the rights as set out in *Miranda v. Arizona*.

VII

ARGUMENT

The record does not support the petitioner's claim that the verdict was coerced by the trial judge by means of supplemental instructions. The jury returned to the courtroom at 1:37 A.M. on May 9, 1969, after having deliberated since 5:55 P.M., the preceding day, except for an hour and a half supper break. The foreman of the jury informed the

Court that they were unable to reach a verdict. The record pages 661-663, pages 3 through 5 of petitioner's brief and pages A6-A8 of Appendix A each set out the dialogue and respondent adopts same by reference.

There is nothing coercive in this exchange between the court and the jury. The court's attitude was courteous and considerate of the jury and its wishes. Most importantly, there was no objection or exception to any of this by the trial attorneys for either side. On the contrary, the inference is strong that the jury was sent back out with the agreement of counsel. Under these circumstances, *Oden v. State*, 41 Ala. App. 212, 127 So. 2d 380, would seem to be determinative of this aspect of the appeal. There the Court of Appeals said (127 So. 2d 382):

> "We have considered the record as to what is alleged to constitute the coercion. It would seem that the court finished charging the jury about noon and instructed the jurors to go to lunch and return at 1:30. The record is silent until an entry of 5:15 p.m. in which we find the court asked the foreman if the jury had reached a verdict, to which the foreman answered, 'Judge, I regret to say we have not.'
>
> "The court then asked if they would like to go for supper and come back at 6:30 or 7:00 in the evening, to which the foreman replied, 'I am afraid it is hopeless.' Thereupon the judge stated he was sorry to hear it because he was not willing to release the jury at that time. The instruction on trying to deliberate covers some four pages of transcript. No objection or exception appears even within the liberal rule of Gidley v. State, 19 Ala. App. 113, 95 So. 330.

> "It is our conclusion that there is nothing that we consider improper on the part of the judge within the scope of the principle which lead to reversal in Orr v. State, 40 Ala. App. 45, 111 So. 2d 627, affirmed 269 Ala. 176, 111 So. 2d 639."

A similar charge to the one now before us was discussed in *Thaggard v. United States*, 354 F. 2d 735, certiorari denied 86 S. Ct. 1222, 383 U. S. 958, 16 L. Ed 2d 301. In that case the Court held that the language did not go beyond the permissible scope of such a charge, saying:

> "Such a charge, so long as it makes plain to the jury that each member of the jury has a duty conscientiously to adhere to his own honest opinion and avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial, cf., dissenting opinion in Huffman v. United States, 297 F. 2d 754, at 759, is still a permissible charge to be given in proper circumstances in this circuit."

The so-called "Allen" charge was given in the *Thaggard* case after the jury had deliberated more than a day. Said charge follows the rule laid down in *Allen v. United States*, 164 U. S. 492, 17 S. Ct. 154, 41 L. Ed. 528.

Respondent submits that the charge as given was not error.

Petitioner argues that there was a failure on the State's part to prove an intelligent waiver of his right to remain silent before admitting into evidence his allegedly inculpatory statements. An examination of the evidence will prove to the contrary, that there was an adequate explanation of his rights and an intelligent waiver of his right to remain silent.

Trooper Patterson was the first law enforcement officer to question the appellant. The trooper went to the appellant's house at about 11:00 on the night of the accident. When the appellant came to the door, Patterson talked with him. The trial court excused the jury (R. 129) and conducted an inquiry into that conversation before allowing evidence of it to be introduced. On page 129 of the record begins the following:

"BY MR. NELSON:

"Q. Did you warn him of his constitutional rights, Bob?

"A. Yes, I did. When he came to the door I told him his car was suspected of being involved in something, and I told him of his rights.

* * *

"Q. What did you tell him?

"A. I told him that his car had been involved in something and we thought he was a suspect, and I told him that he didn't have to make any statement to me that he didn't want to. I told him that if he wanted counsel that counsel could be obtained for him before he told us anything. And he said he knew all that.

"Q. He said he knew all about that, huh?

"A. He knew all of that, or words to that effect. He already knew it.

"Q. Did you tell him — go on then and tell him that if anything he said to you could be used against him in a court of law?

"A. Yes, sir, I did. (R. 130)

* * *

"Q. Go ahead and tell us what rights you warned him of the best you can remember and sit there if you have to and make your list and check them off.

"A. The best I can remember I told him that he didn't have to make any statement if he didn't want to make one. I told him that any statement that he did make would be used against him in a court of law. I told him if he wanted counsel, counsel could be obtained for him. And he said he understood that. (R. 133)

* * *

"Q. Let me ask you this question, Bob: did you or did you not at that time an [sic] occasion tell this defendant that he had a right to remain silent?

"A. Yes, sir, I told him that when I first started talking to him.

"Q. All right. Did you or did you not tell him that anything he said could be used against him in a court of law?

"A. Yes, sir, I told him that. (R. 134)"

The judge ruled there had been a sufficient warning and the jury was returned (R. 135). After an additional predicate of voluntariness was laid (R. 136), only two statements of the defendant were placed in evidence. The first, in answer to the question whether he had struck a child with his car, was, "If I did, I don't remember it" (R. 136). The

second, in response to a question concerning fresh dents on the car, was "I must have hit a mailbox" (R. 138). That was all.

There was no error in the admission of the statements. First of all, there was an adequate showing that the appellant had waived his right to counsel and to remain silent, voluntarily, knowingly, and intelligently, as required by *Miranda v. Arizona*, 384, U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. Secondly, the statements were not incriminating.

The second officer to talk with Daly was Sergeant Hancock of the Criminal Investigation Division of the Public Safety Department. He arrived at the defendant's home shortly after 11:00 (R. 227). Sergeant Hancock read the appellant a card outlining his constitutional rights (R. 227).

> "You have the right to remain silent and anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning, if you wish one."

Sergeant Hancock did not question the petitioner, however (R. 228).

Auxiliary trooper Padgett was present and heard Patterson and Hancock warn Daly of his rights. Padgett never questioned Daly but after petitioner had been warned twice concerning his rights, he approached Padgett and asked, "What was that kid's name I hit?" (R. 33). Padgett didn't acknowledge the question.

"A defendant may waive his right to counsel and to remain silent, provided that waiver is made voluntarily, knowingly, and intelligently. Miranda v. State of Arizona, 384, U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 694. The state properly has the burden to demonstrate a knowing and intelligent waiver of the privilege against self-incrimination and right to counsel with respect to incommunicado interrogation." *Elrod v. State,* 281 Ala. 331, 202 So. 2d 539.

The evidence is clear that Officers Patterson and Hancock fully explained to the petitioner his constitutional rights. He acknowledged that he understood them. This constituted a sufficient showing of voluntariness and intelligent waiver to make the statements admissible under *Miranda v. Arizona* and *Elrod v. State,* 281 Ala. 331, 202 So. 2d 539.

VIII

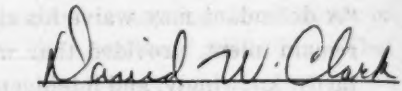
CONCLUSION

For the foregoing reasons, respondent submits that petitioner was indicted, tried and sentenced properly and that the constitutional rights of said petitioner were not violated. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

William J. Baxley

WILLIAM J. BAXLEY
Attorney General of Alabama



DAVID W. CLARK
Assistant Attorney General
of Alabama

250 State Administrative
Building
Montgomery, Alabama 36104

Counsel for Respondent

IX

CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of July, 1972, I served three copies of the foregoing brief and argument of respondent in opposition to petition for writ of certiorari upon one of the attorneys for petitioner, by mailing said copies in a duly addressed envelope to said attorney of record as follows: Honorable James M. Fullan, Jr., 900 Massey Building, Birmingham, Alabama 35203.

David W. Clark

DAVID W. CLARK
Assistant Attorney General
of Alabama

250 State Administrative
Building
Montgomery, Alabama 36104